

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
United States Department of Justice,)	RM-10865
Federal Bureau of Investigation and Drug)	DA No. 04-700
Enforcement Administration)	
)	
Joint Petition for Rulemaking to Resolve)	
Various Outstanding Issues Concerning)	
the Implementation of the)	
Communications Assistance for Law)	
Enforcement Act)	

**COMMENTS OF SBC COMMUNICATIONS, INC. IN RESPONSE TO THE
COMMISSION'S PUBLIC NOTICE SEEKING COMMENT ON THE JOINT PETITION
FOR EXPEDITED RULEMAKING**

Jack S. Zinman
Gary L. Phillips
Paul Mancini
SBC COMMUNICATIONS, INC.
1401 Eye Street, NW
Washington, DC 20005
(202) 326-8910

J. Beckwith Burr
Lynn R. Charytan
Kathryn A. Reilly
WILMER CUTLER PICKERING LLP
2445 M Street, NW
Washington, DC 20037-1420
(202) 663-6000

Counsel for SBC Communications, Inc.

April 12, 2004

TABLE OF CONTENTS

INTRODUCTION	1
I. THE COMMISSION SHOULD CLARIFY THAT CLASSIFICATIONS UNDER CALEA DO NOT AFFECT CLASSIFICATIONS UNDER THE TELECOMMUNICATIONS ACT.....	3
II. THE COMMISSION SHOULD DEVELOP A FACTUAL RECORD TO DETERMINE THE APPLICABILITY OF CALEA TO PARTICULAR ENTITIES AND SERVICES AND THE SCOPE OF THESE CALEA OBLIGATIONS	5
A. Any “Substantial Replacement” Inquiry Requires a Fully Developed Factual Record	6
B. The Commission Should Determine the Scope of CALEA Obligations on a Service-Specific Basis and with the Benefit of a Full Record.....	7
1. Scope of CALEA Obligations Applied to Broadband Access Services	7
2. Scope of CALEA Obligations Applied to Broadband Telephony Services	9
III. THE COMMISSION SHOULD NOT PRESUMPTIVELY APPLY CALEA TO BROAD CATEGORIES OF FUTURE SERVICES, AS THIS APPROACH WOULD STIFLE INNOVATION AND THE DEVELOPMENT OF NEW TECHNOLOGIES	10
IV. THE COMMISSION SHOULD ADOPT A REALISTIC SCHEDULE FOR COMPLIANCE.....	13
V. THE COMMISSION SHOULD PRESERVE THE THREE MECHANISMS FOR COST RECOVERY NOW AVAILABLE TO CARRIERS	14
CONCLUSION.....	17

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
United States Department of Justice,)	RM-10865
Federal Bureau of Investigation and Drug)	DA No. 04-700
Enforcement Administration)	
)	
Joint Petition for Rulemaking to Resolve)	
Various Outstanding Issues Concerning)	
the Implementation of the)	
Communications Assistance for Law)	
Enforcement Act)	

**COMMENTS OF SBC COMMUNICATIONS, INC. IN RESPONSE TO THE
COMMISSION'S PUBLIC NOTICE SEEKING COMMENT ON THE JOINT PETITION
FOR EXPEDITED RULEMAKING**

SBC Communications, Inc. ("SBC") hereby submits its comments in response to the Commission's Public Notice¹ seeking comment on the Joint Petition for Expedited Rulemaking (the "Petition") filed by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, "Law Enforcement").

INTRODUCTION

SBC shares many of the concerns articulated in the Petition, and is committed to working with the Commission and law enforcement, as it has in the past, to ensure that law enforcement has the tools it needs to combat crime and terrorism. SBC also recognizes the importance and urgency of these issues, and urges the Commission to conduct its rulemaking proceeding expeditiously. The Commission should not, however, permit the need for speedy resolution to compromise its deliberative process. The public interest will be best served in this proceeding by a complete and detailed examination of the issues.

¹ Public Notice, *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA No. 04-700 (Mar. 12, 2004) ("Public Notice").

The Communications Assistance for Law Enforcement Act (“CALEA”), 47 U.S.C. § 1001 *et seq.*, is one of several tools available to law enforcement to fight crime and terrorism. In determining which communications applications, if any, are subject to CALEA obligations, as well as the extent to which each obligation may apply, the Commission will want to consider the full range of these tools in order to determine which will best achieve the important law enforcement goals without impeding progress and competition or imposing disparate and burdensome obligations on service providers and their subscribers. At a minimum, the Commission must have a complete record as to what is economically and technically feasible before reaching final conclusions about the applicability of CALEA in any given situation.

SBC urges the Commission to take special care in this proceeding not to undermine the core goals of the Telecommunications Act to encourage innovation and the deployment of advanced services, and to facilitate competition in the telecommunications industry. Consistent with these goals, and notwithstanding SBC’s appreciation that some forms of “broadband access” and “broadband telephony” might fall within CALEA, the Commission should evaluate the applicability of CALEA to particular communications applications rather than adopting general presumptions or blanket rules that impose obligations on broad categories of services and technologies that may turn out to be overbroad on further reflection. The Commission should also take care to ensure that the CALEA obligations resulting from the Commission’s application of CALEA to new services are narrowly tailored to serve the goals of law enforcement and designed to avoid eroding important privacy rights and civil liberties. An overbroad application of CALEA could have the effect of impairing law enforcement’s ability to gather information by subjecting law enforcement and service providers to court challenges. Furthermore, given the inherent complexity of these inquiries, the Commission’s determinations regarding obligations

under CALEA must be based on a fully developed factual record with respect to the particular service at issue.

I. THE COMMISSION SHOULD CLARIFY THAT CLASSIFICATIONS UNDER CALEA DO NOT AFFECT CLASSIFICATIONS UNDER THE TELECOMMUNICATIONS ACT.

In its petition for expedited rulemaking, Law Enforcement acknowledges that the fundamental question to be answered in this proceeding is which applications and entities are subject to CALEA. *See* Petition at 15. It is undisputed that there is a critical need for the Commission to “establish rules that formally identify the services and entities that are covered by CALEA, so that both law enforcement and industry are on notice with respect to CALEA obligations and compliance.” Petition at 8. It may also be true, as Law Enforcement argues, that CALEA permits the Commission to bring various services within the scope of the statute irrespective of the manner in which those applications would — or would not — be regulated under the Telecommunications Act. For example, Law Enforcement asserts, “CALEA does not rely on the definition of ‘telecommunications carrier’ that governs the Communications Act. . . [and i]nstead employs its own, broader, statutory definition.” Petition at 9. Based on this analysis, Law Enforcement urges the Commission to impose CALEA obligations on any provider of switching or transmission to the public in connection with any communications service that meets the “substantial replacement” threshold, whether or not that provider qualifies or has been classified as a common carrier under the Communications Act. *See* Petition at 13.

As noted in the Petition, the Commission itself previously acknowledged that “Congress intended the obligations of CALEA to have broad applicability, subject only to the limitations explicitly contained in the statute.”² Accordingly, although the Commission previously

² Notice of Proposed Rulemaking, *Communications Assistance for Law Enforcement Act*, 13 FCC Rcd 3149, 3161 ¶ 17 (1997) (“*CALEA Second Report and Order NPRM*”).

determined that all telecommunications carriers under the Telecommunications Act are covered by CALEA,³ it may ultimately conclude, as the Petition argues, that the category of covered entities for CALEA purposes is broader.

A determination that CALEA classifications are “different from and broader than” those under the Communications Act, Petition at 15, however, must not be permitted to affect classifications for Title II (or other Communications Act) purposes. As Law Enforcement correctly observes, “[t]he regulatory consequences of such a determination are confined to CALEA itself; an entity can be deemed a telecommunications carrier under CALEA without thereby being classified as a telecommunications carrier under the Communications Act.” Petition at 13. While it may be appropriate to interpret the category of “telecommunications carrier” more broadly under CALEA in order to promote the important law enforcement and national security objectives underlying that Act,⁴ such expansive classifications would severely undermine the distinctly deregulatory purpose of the 1996 Telecommunications Act.⁵

³ Second Report and Order, *Communications Assistance for Law Enforcement Act*, 15 FCC Rcd 7105, 7114 ¶ 17 (1999) (“*CALEA Second Report and Order*”) (concluding that CALEA applies to telecommunications services provided by “all entities previously classified as ‘common carriers,’” as well as “cable operators and electric and other utilities to the extent they offer telecommunications services for hire to the public.”).

⁴ See, e.g., H.R. Rep. No. 103-827, reprinted in 1994 U.S.C.C.A.N. 3489, 3489 (1994) (“House Report”) (“The purpose of [CALEA] is to preserve the government’s ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies such as digital or wireless transmission modes, or features and services such as call forwarding, speed dialing and conference calling. . . .”)

⁵ See, e.g., Joint Statement of Managers, S. Conf. Rep. 104-230, at 113 (1996) (The fundamental principle of the Act is “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”)

For these reasons, if the Commission adopts a classification system for CALEA that does not mirror the classification system contained in the Communications Act, it must simultaneously reaffirm its ruling that “entities and services subject to CALEA must be based on the CALEA definition . . . independently of their classification for the separate purposes of the Communications Act,” *CALEA Second Report and Order* at 7112 ¶ 13, and clarify that the classification of a provider or application as “telecommunications” for purposes of CALEA must not affect how the provider or application is classified for purposes of Title I and Title II regulation.

II. THE COMMISSION SHOULD DEVELOP A FACTUAL RECORD TO DETERMINE THE APPLICABILITY OF CALEA TO PARTICULAR ENTITIES AND SERVICES AND THE SCOPE OF THESE CALEA OBLIGATIONS.

In its Petition, Law Enforcement raises a number of issues that cannot be resolved by the Commission without a fully developed factual record. Indeed, the Commission’s determinations concerning the applicability of CALEA to particular applications, as well as the scope of these obligations, must be based on a fully developed factual record with respect to the particular communications application at issue. A decision by the Commission to impose obligations on service providers in the absence of a factual record could violate the reasoned decision making requirement of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). Because a factual record has not yet been developed in this proceeding, the Commission should avoid reaching premature conclusions in its NPRM about the applicability of CALEA to particular services, service providers, or applications, or about the scope of CALEA obligations. Instead, the Commission should conduct the rulemaking expeditiously, but allow the parties to develop the record needed to inform its decision making and support the Commission’s ultimate conclusions.

A. **Any “Substantial Replacement” Inquiry Requires a Fully Developed Factual Record.**

In addition to asserting that providers of broadband access and telephony services satisfy the general definition of “telecommunications carriers” under CALEA, Petition at 23, 30, Law Enforcement offers another justification for bringing these providers within the scope of CALEA. According to Law Enforcement: “[a]s long as an entity is engaged in transmission or switching, the Commission can and should bring that entity within the scope of CALEA even if the entity is not offering a separate telecommunications service to the public as a common carrier, as long as the Commission determines that ‘such service is a replacement for a substantial portion of the local telephone exchange service’ and that extending CALEA coverage ‘is in the public interest.’” Petition at 13 (quoting 47 U.S.C. § 1001(8)(B)(ii)).

Law Enforcement urges the Commission to determine that the substantial replacement standard expands the scope of CALEA coverage beyond common carriers and services provided on a private carriage basis — to include, for example, a broadband access provider that might be deemed only to be providing “transmission” to its own Internet service provider. Such a determination would not, however, resolve a number of important questions that must be answered in this context. These questions are difficult and important, and their answers are likely to be highly contentious whatever the Commission concludes. To answer these questions, the Commission will be best served by a fully developed record. For example, it seems incontrovertible that the “substantial replacement” inquiry is necessarily fact-sensitive and must be conducted on the basis of specific communications applications. But it is not clear how the Commission would determine that a particular communications application has “substantially replaced” local exchange service without a record that examines market data such as penetration and substitution information, as well as consumer perception. In addition, a finding by the

Commission that a particular service is a substantial replacement for local telephony service is only a first step. The Commission must then consider whether or not the public interest would be served by application of CALEA to that service. This question cannot be answered in the abstract, as the answer will very much depend on the particular facts relating to that entity or service. Once again, a Commission decision on these points must be informed by careful consideration of a detailed record.

B. The Commission Should Determine the Scope of CALEA Obligations on an Application-Specific Basis and with the Benefit of a Full Record.

Once the Commission resolves the definitional questions concerning the services and entities to which CALEA applies, the Commission will still need a fully developed factual record to determine the precise nature of the CALEA obligations to be imposed on particular providers and particular communications applications. This inquiry is far more complex in the packet switched world than it is in the circuit switched world because, in the former, access to the many different types of information involved in the communication will vary from provider to provider and from application to application. The Commission must take these differences into account when it determines the scope of any applicable CALEA obligation, and must specifically tailor the obligation to fit the particular application offered.

1. Scope of CALEA Obligations Applied to Broadband Access Services

Should the Commission determine that particular broadband access applications are subject to CALEA, it must then determine the scope of each provider's obligations thereunder. CALEA obligations must necessarily vary depending on the specific communications application provided by the entity in question. In addition, CALEA obligations applicable to the same type of broadband access services may well vary from application to application, and from provider to provider, based on factors such as the design of the particular network, the ownership of network

elements, the points of traffic aggregation, the severability of traffic types, and the ability of the network operators to segregate traffic. As the legislative history of CALEA makes clear, the Commission must shape any provider's obligations under the statute to reflect what is actually in that provider's control, and "[t]he question of which communications are in a carrier's control will depend on the design of the service or feature at issue, which this legislation does not purport to dictate." House Report at 3502.

For example, where SBC is merely providing DSL transport service and is not also the Internet service provider, the architecture of SBC's network may only permit it to access and provide to law enforcement the entire stream of packets that are sent to the Internet service provider. In that situation, SBC may have no ability either to extract user-specific data from the stream or to translate the packets into useable form. Accordingly, any CALEA obligation imposed on SBC with respect to services where SBC is merely a conduit must reflect these limitations. In these cases, law enforcement may need to work with both transport providers and Internet service providers in order to retrieve intelligible broadband content and/or call-identifying information.⁶

Similarly, where SBC is the Internet service provider, but not the application service provider, SBC acts merely as a conduit in connection with the application, and thus may only be able to access and provide to law enforcement the entire packet stream that it delivers to or from the application provider. The transmission across the network for one application is indistinguishable from other applications, making application-specific isolation of packets impossible. In these circumstances, SBC's Internet service provider may be able to identify and segregate data flows associated with a specific user, but nonetheless cannot translate the packet

⁶ As noted by Congress, CALEA "is not intended to guarantee 'one-stop shopping' for law enforcement." House Report at 3502.

stream or further limit the flow of data to that which law enforcement has been authorized to access. Here, law enforcement may also have to go to the application service provider to obtain useable information, and any CALEA requirements must be tailored to reflect these constraints.

2. Scope of CALEA Obligations Applied to Broadband Telephony Services

SBC recognizes the likelihood that the Commission will conclude that CALEA applies to some applications of broadband telephony, but cautions, as the Commission itself has recognized, that “VoIP” is a generic term used to describe services that are delivered in a variety of ways.⁷ Depending on network design and other features, VoIP providers will each have different capabilities to access VoIP applications. A factual record is therefore needed to define VoIP services for the purposes of CALEA and to establish the scope of a service provider’s obligations with reference to the particular role it plays in the provision of a given VoIP application. As Law Enforcement correctly observes, “[g]iven its myriad forms, the strict delineation of CALEA’s application to other forms of broadband telephony service and other business models would be most appropriately addressed after a full assessment of all comments filed in this proceeding.” Petition at 17 n.39.

As with broadband access services, any CALEA obligation applicable to a broadband telephony provider must reflect the services actually offered by the entity in question. For example, where SBC provides its own VoIP application, in some scenarios it can provide some call-identifying information and unencrypted call content. In those scenarios where SBC does

⁷ See, e.g., Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, at 4 ¶ 3 n.7 (Mar. 10, 2004) (“While we adopt no formal definition of ‘VoIP,’ we use the term generally to include any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony.”); *id.* at 2 ¶ 1 n.1 (acknowledging “the broad scope entailed by [its] definition [of IP-enabled services]”).

not have access to the bearer stream, law enforcement may obtain call content from the broadband access service provider. However, where a different entity, such as Vonage, offers the VoIP application over SBC's DSL transport and Internet access networks, only Vonage can extract call-identifying information. In this situation, call-identifying information would not be "reasonably available" to SBC, and SBC would therefore have no obligation under CALEA to provide such information to law enforcement. 47 U.S.C. § 1002. Significantly, the provision of VoIP services does not require the pre-existence of any business or technical relationships between the access, Internet, and application service providers. The imposition of any CALEA obligation that would require service providers to establish such relationships solely for the purpose of providing law enforcement with "one-stop shopping" could dramatically slow innovation and competition. Accordingly, any CALEA requirements imposed by Commission in this context would need to reflect a covered provider's inability to provide specific forms or types of information.

III. THE COMMISSION SHOULD NOT PRESUMPTIVELY APPLY CALEA TO BROAD CATEGORIES OF FUTURE SERVICES, AS THIS APPROACH WOULD STIFLE INNOVATION AND THE DEVELOPMENT OF NEW TECHNOLOGIES.

Law Enforcement proposes that the following three categories of services should be presumptively covered by CALEA: (1) any service that "directly competes" against a service already deemed to be covered by CALEA; (2) any service provided by an entity that is engaged in providing wire or electronic communication switching or transmission service to the public for a fee; and (3) any service currently provided using any packet-mode technology and covered by CALEA that subsequently is provided using a different technology. Petition at 33-34. In addition, Law Enforcement proposes that all future packet-mode services must be CALEA-compliant at the time they are first offered, and any carrier that "believes that any of its current

or planned equipment, facilities, or services are not subject to CALEA [must] immediately file a petition for clarification to determine CALEA's obligations." Petition at 34.

The Commission should reject these proposals. Congress made clear that "if a service of [sic] technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed," and specifically rejected "original versions of the legislation, which would have barred introduction of services or features that could not be tapped." House Report at 3499. Furthermore, the approach urged by Law Enforcement would inevitably inhibit the development of new and advanced services in violation of both CALEA and the Telecommunications Act of 1996.

Apart from the fact that the threshold presumptions proposed by Law Enforcement are not workable from a practical perspective, SBC is concerned about the impact of *any* set of presumptions that imposes new obligations on emerging technology. To encourage the development and deployment of advanced services and to avoid impermissible expansion of CALEA's scope, the Commission must determine the applicability of and obligations under CALEA with respect to new services based on individualized, fact-based inquiries relating to the particular services. Congress made clear that CALEA was designed to ensure law enforcement's continued ability to conduct authorized wiretaps, but to do so "without impeding the introduction of new technologies, features, and services."⁸ Indeed, Congress explicitly recognized that a key policy underlying the Act is "the goal of ensuring that the telecommunications industry [is] not hindered in the rapid development and deployment of the new services and technologies that continue to benefit and revolutionize society." *Id.* at 3493. But the presumptions urged by Law

⁸ House Report at 3489; *see also id.* at 3493 (One of the three primary concerns underlying CALEA is "to avoid impeding the development of new communications services and technologies.").

Enforcement would have precisely that effect: it is difficult to imagine a more innovation-stifling requirement than placing the burden on the provider to seek approval before deploying a new service.

Similarly, the adoption of such presumptions would contravene the Commission's mandate pursuant to section 706 of the 1996 Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."⁹ Indeed, section 706 explicitly "directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services."¹⁰ Consistent with these goals, any determination that CALEA applies to a particular service, application, or technology must be based on a well-developed record; Law Enforcement's proposed "presumptions" are the exact opposite of the type of analysis required under CALEA, and could negatively impact the industry, consumers, and even law enforcement.

Law Enforcement's proposed "direct competition" test (Petition at 33) suffers from several flaws. First, this proposal would effectively write the "substantial replacement" test out of the statute inasmuch as any service that might potentially become a "substantial replacement" for local telephone exchange necessarily would directly compete with local exchange service. Second, in addition to being vague and overbroad, the "direct competition" standard proposed by Law Enforcement could be interpreted as encompassing information services, which are specifically excluded from CALEA. 47 U.S.C. § 1001(8)(c). Finally, as noted above with respect to the substantial replacement inquiry, any determination that a service "directly

⁹ 47 U.S.C. § 157(a).

¹⁰ Memorandum Opinion and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24044-45 ¶ 69 (1998) ("Advanced Services Order"), *aff'd in part, vacated on other grounds*, *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

competes” with a service already subject to CALEA must be informed by market-based analysis, which must include some evidence of market penetration and consumer perceptions.

IV. THE COMMISSION SHOULD ADOPT A REALISTIC SCHEDULE FOR COMPLIANCE.

Law Enforcement’s proposed schedule assumes that the adoption of industry standards and development of CALEA-compliant solutions by manufacturers are within the providers’ control. Petition at 40-53. Because these assumptions are incorrect, the Commission should reject the schedule proposed by Law Enforcement, which requires a provider, within six months of the date of the *Public Notice*, to “commit to either an intercept standard published by a standard-setting body pursuant to a CALEA Section 107 or a *bona fide* intercept standard established by the carrier and its manufacturer(s)” for each service a provider offers. Petition at 43-44. The Petition ignores the fact, however, that no clock can start running until industry has agreed upon and adopted standards. As the history of standards development in the CALEA context demonstrates, the amount of time needed to develop standards is uncertain and may vary by service.

Furthermore, once a standard has been developed, achieving the next milestone will turn on whether and how quickly manufacturers are able develop a solution that works with existing infrastructure. Manufacturers cannot develop CALEA solutions until they have the standards against which to build. With respect to the services and applications at issue in this proceeding, although a standard for VoIP service has been proposed, no standard has yet been developed for broadband access services. Law Enforcement’s Petition ignores this issue, and proposes to hold providers responsible for ensuring that manufacturers develop an intercept solution within twelve months of the *Public Notice*. Petition at 45. In reality, myriad factors — many of which are

outside a service provider's control — influence the timing of manufacturers' development of solutions.

Only after manufacturers have agreed upon CALEA-compliant solutions for both new and existing equipment that are interoperable and compatible with other technologies and facilities in the service providers' networks, can a reasonable timeline be established for compliance for existing packet services.

V. THE COMMISSION SHOULD PRESERVE THE THREE MECHANISMS FOR COST RECOVERY NOW AVAILABLE TO CARRIERS.

There is no question that covered providers should be permitted to recover their costs of CALEA compliance; not only is this necessary to provide the appropriate incentives for both service providers and law enforcement, but forcing covered entities to bear these enormous costs without reimbursement may amount to a confiscation in violation of the Fifth Amendment to the United States Constitution. There are three sources for cost recovery, each of which must remain available to covered service providers.

First, as Law Enforcement notes, covered providers should have the option to pass on to subscribers the costs of CALEA compliance. Petition at 65. This approach spreads implementation costs most widely, because, as the Commission has recognized, “[t]o the extent that there are costs borne by the carriers and passed through to customers . . . it is likely that the costs would be shared by all ratepayers, and, therefore, would be significantly diluted on an individual residential ratepayer basis.”¹¹ Furthermore, as Law Enforcement demonstrates in the Petition, allowing providers to recover their CALEA implementation costs from customers is

¹¹ Order on Remand, *Communications Assistance for Law Enforcement Act*, 17 FCC Rcd 6896, 6919 ¶ 65 (2002) (“*CALEA Remand Order*”); see also Petition at 65-66 (quoting *CALEA Remand Order*).

consistent with the cost recovery mechanism permitted by the Commission in the context of local number portability implementation, E911 compliance, and universal fund contributions.¹²

Second, law enforcement also should bear a share of covered entities' implementation costs. The Petition argues that, with respect to post-1995 equipment, the only costs associated with electronic surveillance that law enforcement should bear are the incremental administrative costs associated with implementing a particular intercept order. Petition at 68-70. But the Commission has already found the opposite: in the *CALEA Remand Order*, the Commission ruled that carriers may "recover at least a portion of the CALEA software and hardware costs by charging to LEAs, for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery the specific costs associated with each order." *Id.* at 6917 ¶ 60.

Third, under CALEA, where compliance with the capability requirements with respect to the carrier's equipment, facility, or service is not "reasonably achievable" (e.g., compliance would require the carrier to retrofit a large part of its network or rearchitect its network altogether), the carrier may petition the Commission pursuant to § 109, 47 U.S.C. § 1008.¹³ If

¹² See Petition at 66-67 nn. 110-13 (internal citations omitted).

¹³ Section 109(b)(2) provides, in relevant part:

If compliance with the assistance capability requirements of section 103 is not reasonably achievable with respect to equipment, facilities, or services deployed after January 1, 1995—

(A) the Attorney General, on application of a telecommunications carrier, may agree, subject to the availability of appropriations, to pay the telecommunications carrier for the additional reasonable costs of making compliance with such assistance capability requirements reasonably achievable; and

(B) if the Attorney General does not agree to pay such costs, the telecommunications carrier shall be deemed to be in compliance with such capability requirements.

the Commission grants such a petition, the Attorney General must agree to pay the costs of making compliance reasonably achievable or the carrier will be deemed to be in compliance with the capability requirements. *Id.* In addition, to the extent that providers do not have the requisite capacity to accommodate law enforcement's requests, the provider may petition the Attorney General for reimbursement, and is deemed to be in compliance until the Attorney General agrees to make such reimbursements. 47 U.S.C. §§ 1003(d), (e). CALEA's capability and capacity reimbursement provisions are fundamental aspects of CALEA, which play a critical role in protecting innovation and encouraging law enforcement to impose reasonable and practicable CALEA obligations on U.S. industry.

Taken together, these three cost recovery mechanisms can be used to spread costs equitably, protect innovation, and prevent overreaching. Accordingly, all three mechanisms should remain open to carriers for recovery of CALEA implementation costs.

CONCLUSION

For these reasons, SBC urges the Commission to proceed expeditiously with its rulemaking proceeding, to develop a factual record on which it may base these complex determinations, and to exercise extreme caution with respect to adopting blanket presumptions or premature conclusions about CALEA before the necessary record has been duly considered.

Respectfully submitted,

/s/ Jack S. Zinman

Jack S. Zinman
Gary L. Phillips
Paul Mancini
SBC Communications, Inc.
1401 Eye Street, NW
Washington, DC 20005
(202) 326-8910

J. Beckwith Burr
Lynn R. Charytan
Kathryn Reilly
Wilmer Cutler Pickering LLP
2445 M Street, NW
Washington, DC 20037-1420
(202) 663-6000

Counsel for SBC Communications, Inc.

April 12, 2004

CERTIFICATE OF SERVICE

I, Weyatta E. Wureh, hereby certify that on this 12th day of April, 2004, copies of the foregoing Comments of SBC Communications, Inc. in Response to the Commission's Public Notice Seeking Comment on the Joint Petition for Expedited Rulemaking were served by hand delivery upon the following:

/s/ Weyatta E. Wureh

Weyatta E. Wureh

April 12, 2004

**COMMISSIONER KEVIN J. MARTIN
FEDERAL COMMUNICATIONS
COMMISSION
445 12TH STREET, SW
ROOM 8-A204
WASHINGTON, DC 20554**

**COMMISSIONER JONATHAN ADELSTEIN
FEDERAL COMMUNICATIONS COMMISSION
445 12TH STREET, SW
ROOM 8-C302
WASHINGTON, DC 20554**

**JOHN ROGOVIN
GENERAL COUNSEL
FEDERAL COMMUNICATIONS
COMMISSION
445 12TH STREET, SW
ROOM 8-C723
WASHINGTON, DC 20554**

**ED THOMAS, CHIEF
OFFICE OF ENGINEERING & TECHNOLOGY
FEDERAL COMMUNICATIONS COMMISSION
445 12TH STREET, SW
ROOM 7-C155
WASHINGTON, DC 20554**

**JULIUS KNAPP, DEPUTY CHIEF
OFFICE OF ENGINEERING AND
TECHNOLOGY
FEDERAL COMMUNICATIONS
COMMISSION
445 12TH STREET, SW
ROOM 8-7C250
WASHINGTON, DC 20554**

**WILLIAM MAHER, CHIEF
WIRELINE COMPETITION BUREAU
FEDERAL COMMUNICATIONS COMMISSION
445 12TH STREET, SW
ROOM 5-C450
WASHINGTON, DC 20554**

**JOHN MULETA, CHIEF
WIRELINE TELECOMMUNICATIONS
BUREAU
FEDERAL COMMUNICATIONS
COMMISSION
445 12TH STREET, SW
ROOM 3-C252
WASHINGTON, DC 20554**

**JAMES DAILEY, DIRECTOR
OFFICE OF HOMELAND SECURITY
ENFORCEMENT BUREAU
FEDERAL COMMUNICATIONS COMMISSION
445 12TH STREET, SW
ROOM 7-C831
WASHINGTON, DC 20554**

**GERALDINE MATISE
OFFICE OF ENGINEERING AND
TECHNOLOGY
FEDERAL COMMUNICATIONS
COMMISSION
445 12TH STREET, SW
ROOM 7-A260
WASHINGTON, DC 20554**

**JOHN SPENCER
WIRELESS TELECOMMUNICATIONS BUREAU
FEDERAL COMMUNICATIONS COMMISSION
445 12TH STREET, SW
ROOM 3-A103
WASHINGTON, DC 20554**

**TOM BEERS, DEPUTY CHIEF
INDUSTRY ANALYSIS AND
TECHNOLOGY DIVISION
WIRELINE COMPETITION BUREAU
FEDERAL COMMUNICATIONS
COMMISSION
445 12TH STREET, SW
ROOM 6-A220
WASHINGTON, DC 20554**

**JEFFREY CARLISLE, SR. DEPUTY BUREAU
CHIEF
WIRELINE COMPETITION BUREAU
FEDERAL COMMUNICATIONS COMMISSION
445 12TH STREET, SW
ROOM 5-C356
WASHINGTON, DC 20554**

**RODNEY SMALL
OFFICE OF ENGINEERING AND
TECHNOLOGY
FEDERAL COMMUNICATIONS
COMMISSION
445 12TH STREET, SW
WASHINGTON, DC 20554**